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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

A. RAY OLIVER, Executor of the Estate of Lola Castlio Oliver, Deceased, A. RAY OLIVER and B. IRENE CASTLIO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. 151.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONERS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

A. RAY OLIVER, Executor of the Estate of Lola Castlio Oliver, Deceased, A. RAY OLIVER and B. IRENE CASTLIO, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	No. 151.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONERS.

This case is here on writ of certiorari issued by this Court on the 14th day of October, 1946, directed to the United States Circuit Court of Appeals for the Eighth Circuit to review the opinion and judgment of said Court in the case of Lola Castlio Oliver and A. Ray Oliver, Her Husband, and Mrs. B. I. Castlio (Also Known as B. Irene Castlio), Appellants, v. United States of America, Appellee, No. 13,174, Civil, in said Court of Appeals. A. Ray Oliver, Executor of the Estate of Lola Castlio Oliver, Deceased, succeeded the said Lola Castlio Oliver, deceased, as a party to the said cause by an order entered by the said Circuit Court of Appeals on the 17th day of May, 1946 (R. p. 103).

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the above mentioned case, No. 13,174, appears in the printed transcript filed herein on pages 77 to 84, inclusive, and is now printed in 155 Fed. (2d) 73.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 [28 U. S. C. A., Sec. 347 (a)].

The judgment of which review is sought was entered by the Circuit Court of Appeals for the Eighth Circuit on April 9, 1946 (R. p. 85), but did not become final until April 30, 1946, when petitioners' (appellants') Petition for Rehearing was denied (R. p. 99).

An application to withhold a mandate of the said Court of Appeals for thirty days in order to permit petitioners to apply to this Court for writ of certiorari was sustained by the Court of Appeals by order entered on May 10, 1946 (R. p. 100).

A duly certified copy of the Record, including all of the proceedings in this cause in the District Court of the United States and in said Court of Appeals, was filed herein together with the requisite number of copies thereof in compliance with the rules of this Court.

The constitutional provision involved herein is Amendment V to the Constitution of the United States which provides in part "* * * nor shall private property be taken for public use, without just compensation."

The statutory provision involved is 40 U. S. C. A., Sec. 258a, c. 307, Sec. 1, 46 Stat. 1421.

STATEMENT.

The petitioners were the owners of certain land located in St. Charles County, Missouri. On the 24th day of December, 1940, they signed a written offer designated an "Option to Purchase Land" to sell this land to the United States of America for the sum of $70,000 (R. pp. 36-38). This offer was accepted by the Government on the 28th day of December, 1940 (R. p. 38).

The Government assumed possession as it had a right to do under the contract and has remained in continuous possession ever since. But subsequently and on the 6th day of June, 1941, it repudiated its agreement and filed a condemnation proceeding against the petitioners in the United States District Court for the Eastern District of Missouri to acquire title to the land in that manner (R. pp. 2, 3). This proceeding was in the usual form and was brought pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U. S. C. A., Sec. 257), and the Act of Congress approved July 2, 1917 (50 U. S. C. A., Sec. 171), as amended, which authorized the acquisition by the Secretary of War of land suitable and necessary for military purposes (R. pp. 4-9). On the same day the condemnor filed a Declaration of Taking which recited, among other things (R. p. 10):

> "1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. A., Sec. 258a). * * *."

Just compensation for the land taken was estimated therein to be $21,500.00 and that sum was deposited in the registry of the court (R. p. 14). Also on the same day an order was entered vesting the title to the land in question in the Government (R. pp. 15-17).

The landowners filed an answer asserting that the parties to the proceeding had entered into a contract prior to the filing of the suit and requesting the court to fix the award in the condemnation proceedings at the amount mentioned in the contract, to-wit, $70,000, with interest thereon at six per cent (6%) per annum from the date of the acceptance of the contract, to-wit, December 28, 1940 (R. pp. 17-26).

No proceedings were had in this cause to fix the value of the property taken until this Honorable Court, in the companion cases of **Muschany v. United States** and **Andrews v. United States**, 324 U. S. 49, 65 S. Ct. 442, decided that the so-called Options to Purchase Land were valid, and, in effect, fixed the amount of the award in each condemnation proceeding at the amount agreed upon in the Option to Purchase Land applicable to each such proceeding. Thereafter, and on the 6th day of May, 1945, the Government filed a motion requesting the court to enter a judgment condemning the property and fixing the landowners' compensation at the sum of $70,000 and directing the condemnor to pay into the registry of the court the deficiency of $48,500, but without allowing the landowners any interest (R. pp. 27, 28). On the 2nd day of May, 1945, the petitioners filed an answer to the Government's motion requesting the court to enter a judgment condemning the land and fixing the compensation for the taking of the land at $70,000, but praying the court to also award the petitioners interest at the rate of six per cent (6%) per annum upon said $70,000 from the date of taking on or about December 28, 1940, to the making of the deposit ($21,500) at the time of the filing of the Declaration of Taking on June 6, 1941, and with interest at the same rate on the deficiency of $48,500 from June 6, 1941, until the payment of said deficiency (R. pp. 29, 30). On May 17, 1945, the Government paid into court the deficiency of $48,500 (R. p. 52).

Because of the large number of cases pending in the said United States District Court arising under the same circumstances and because of the widespread interest therein, all of the so-called Weldon Spring cases were submitted at the same time to a three-judge court consisting of the three United States District Judges sitting in the Eastern Judicial District of Missouri (R. pp. 31-46), but each Judge ruled individually on each of said cases pending before him.* Since all of these cases were submitted at the same time, no proof was required by the District Court from each individual landowner of the date of the taking of possession of his tract by the Government, the Court saying that if and when it is determined that the landowners are entitled to interest, they will be given an opportunity to make a showing in each case as to when the Government took possession (R. pp. 45, 46). On May 14, 1945, the District Court, in the proceeding to condemn the land of the petitioners, entered a judgment condemning the land and fixing the compensation at the sum mentioned in the contract, to-wit, $70,000, but denying the landowners any sum as interest (R. pp. 47-52). Subsequently, the petitioners took an appeal in this cause to the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 1). On April 9, 1946, said United States Circuit Court of Appeals filed its opinion and entered a judgment in said cause affirming the judgment of the District Court (R. pp. 77-85). On the same day memorandum opinions were filed by said United States Circuit Court of Appeals in appeals from companion cases entitled and designated United States of America, appellant, v. Edgar S. Albrecht et al., appellees, No. 13,223, Civil; United States of America, appellant, v. Q. W. S. S. Realty & Investment Company, appellee, No.

*Judge Moore and Judge Duncan ruled that the landowners were entitled to interest in the cases pending before them. Judge Moore's opinion on the subject is reported at 61 F. Supp. 199. Judge Duncan's opinion is not reported. Judge Hulen ruled that the landowners were not entitled to interest in an opinion reported at 60 F. Supp. 741. The instant case is one of several pending before Judge Hulen.

13,226; United States of America, appellant, v. Edward J. Linnenbringer et al., appellees, No. 13,227, and United States of America, appellant. v. Dennis B. Pitman et al., appellees, No. 13,228, reported in 155 Fed. (2d) 77. These last mentioned appeals were decided upon the basis of the court's opinion in this cause. This court has granted certiorari in each of the last mentioned cases.

Thereafter, and on the 23rd day of April, 1946, and within the time allowed by the rules of the said United States Circuit Court of Appeals, the petitioners filed their Petition for Rehearing (R. pp. 87-99). This petition was on the 30th day of April, 1946, denied by the said United States Circuit Court of Appeals, on which day said judgment of the said United States Circuit Court of Appeals in this cause became final (R. p. 99).

The duly certified record, including all the proceedings in this cause in said District Court and in said United States Circuit Court of Appeals, have been filed herein, together with the requisite number of printed copies thereof.

QUESTIONS PRESENTED.

The questions presented are:

1. Did the petitioners, as landowners, waive their right to interest from the date of taking to the date of payment by entering into the contract in question?

2. Were the petitioners, as landowners, denied their statutory rights by the failure to allow them interest from the date of taking to the date of payment of the award?

3. Were the petitioners, as landowners, denied just compensation guaranteed them by the Constitution of the United States by the failure to allow them such interest?

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In construing the contract as fixing the total amount to which petitioners, as landowners, were entitled because of the taking of their land.

2. In holding that the landowners by their successful defense of the contract in the condemnation proceeding thereby changed the nature of the proceedings so as to preclude recovery of interest for the period between the taking of the property and payment.

3. In refusing to allow interest against the Government for delay.

4. In refusing to recognize that a statute existed which required the Government to pay the landowners interest.

5. In refusing to hold that the Government was estopped to deny the landowners' right to interest.

6. In refusing to accord the landowners "just compensation" as required by the Constitution of the United States.

7. In distinguishing the opinion of the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190.

SUMMARY OF THE ARGUMENT.

I.

A landowner whose property has been taken in condemnation is guaranteed "just compensation" which includes not only the fair market value of the property at the time of the taking but additional compensation for loss of use of the land or postponment of the use of its money equivalent. Prior to the enactment of 40 U. S. C. A., Sec. 258a, the federal courts awarded the landowner interest at the local rate upon the value of the property from the date of taking to the date of payment. But now, under said statute, under which the Government proceeded in this case, interest is awarded at the rate of six per cent (6%) per annum upon the value of the property from the date of taking to the date of payment, except that no interest is allowed upon any sum paid into court pursuant to a declaration of taking.

Shoshone Tribe of Indians v. United States, 299 U. S. 476, 57 S. Ct. 244;

Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354;

United States v. Rogers, 255 U. S. 163, 41 S. Ct. 281;

Fifth Amendment to the Constitution of the United States;

Article 2, Sec. 21, of the Constitution of the State of Missouri (1875);

40 U. S. C. A., Sec. 258a, approved Feb. 26, 1931.

II.

Generally interest cannot be collected from a sovereign in the absence of a statute or a contract requiring such payment, but this rule has no application in condemnation cases where the property is taken before payment is made.

United States v. State of North Carolina, 136 U. S. 211, 10 S. Ct. 920;

Seaboard Airline Ry. Co. v. United States, 261 U. S. 299, 43 S. Ct. 354;

United States v. Sargent, 162 Fed. 81, 89 C. C. A. 81;

Van Wagoner, Highway Commissioner, v. Morrison, 279 Mich. 285, 271 N. W. 760;

State ex rel. Steubenville Ice Co. v. Merrell, Director of Highways, 127 Ohio St. 453, 189 N. E. 116.

III.

The contract in the instant case served in lieu of a commissioners' award or a jury verdict fixing the value of the property at the time of taking.

Danforth v. United States, 308 U. S. 271, 60 S. Ct. 231;

Muschany v. United States, 324 U. S. 49, 65 S. Ct. 442;

United States v. Baugh, 149 Fed. (2d) 190 (C. C. A. 5).

IV.

The landowners did not waive their right to interest guaranteed them under the Constitution and by statute in the contract in the instant case.

United States v. Baugh, 149 Fed. (2d) 190 (C. C. A. 5);

Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond, 262 U. S. 649, 43 S. Ct. 651.

V.

A condemnation statute under which proceedings are instituted will be construed strictly in favor of the landowner and the statute must be fully complied with.

City of Cincinnati v. Vester, 281 U. S. 439, 50 S. Ct. 360;

United States v. 2.4 Acres of Land in Lake County, 138 Fed. (2d) 295;

City of St. Louis v. Smith, 325 Mo. 471, 30 S. W. (2d) 729;
State ex rel. Siegel v. Grimm, 314 Mo. 242, 284 S. W. 490;
40 U. S. C. A., Sec. 258a.

VI.

The United States, having accepted the benefits of 40 U. S. C. A., Sec. 258a, by obtaining title pending the litigation is estopped from denying the obligation arising from that section to pay interest to the landowner.

Davis v. Wakelee, 156 U. S. 680, 15 S. Ct. 555;
Officer v. J. L. Owens Co., 252 Fed. 337;
Holland v. Spell, 144 Ind. 561, 42 N. E., l. c. 1015;
Horne v. Beattie, 167 La. 647, 120 So. 38;
Chicago Great Western Ry. Co. v. Kemper, 256 Mo. 279, 166 S. W. 291;
Mauritz v. Schwind, 101 S. W. (2d) 1085 (Tex. C. A.);
Southern Surety Co. v. Illinois Powder Mfg. Co., 31 S. W. (2d) 314 (Tex. C. A.);
40 U. S. C. A., Sec. 258a.

ARGUMENT.

I.

Where a Condemnor Takes Property Before Payment Therefor Is Made, the Landowner Will Be Allowed Interest or Its Equivalent Upon the Award From the Date of Taking to the Date of Payment as a Part of the "Just Compensation" to Which He Is Entitled.

A landowner whose property has been taken by a condemnor is guaranteed "just compensation" by the Fifth Amendment to the Constitution of the United States and by Article 2, Section 21 of the Constitution of the State of Missouri (1875). This is deemed to be the fair market value at the time of the taking. And where the condemnor has taken the property before compensation was paid, "just compensation" includes not only the fair market value of the property at the time of the taking, but an additional item that will compensate the landowner for the loss of the use of his land or the postponement of the use of the money due him. **Shoshone Tribe of Indians v. United States**, 299 U. S. 476, 57 S. Ct. 244; **Seaboard Airline Ry. Co. v. United States**, 261 U. S. 299, 43 S. Ct. 354; and **United States v. Rogers**, 255 U. S. 163, 41 S. Ct. 281.

A statement of the rule is found in **Seaboard Airline Ry. Co. v. United States**, at 261 U. S., l. c. 306, 43 S. Ct. 356, as follows:

> "Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.

> Interest at a proper rate is a good measure by which to ascertain the amount so to be added."

In **Shoshone Tribe of Indians v. United States**, Mr. Justice Cardozo, speaking for the court, said (299 U. S., l. c. 497, 57 S. Ct., l. c. 251):

> "Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages."

The practice grew up in federal condemnation cases, where the property was taken before compensation was paid, of compensating the owner for the loss of use of his property or of his money by awarding him interest at the local rate on the fair market value of the property from the date of taking to the date of payment of compensation. In **United States v. Rogers**, supra, the Supreme Court, in affirming an allowance of interest at the rates fixed by the statutes of New Mexico where the lands in question were located, said (255 U. S., l. c. 169, 41 S. Ct., l. c. 282):

> "The government urges that the Conformity Act of August 1, 1888, does not require the United States government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The fact that the rule is in harmony with the policy of the state where the lands are situated does not militate against, but makes for, the justice and propriety of its adoption."

From these authorities it will be seen that where the property was taken before payment was made, the landowner was entitled to interest as a part of the "just compensation" guaranteed by the Constitution even though

the statute under which the proceedings were brought made no provision for the payment of interest or any substitute therefor. Such was the case in the authorities to which reference has just been made.

Ultimately, an Act was passed by Congress, 40 U. S. C. A., Sec. 258a, approved February 26, 1931, which provides in part as follows:

> "Upon the filing (of) said Declaration of Taking and of the deposit in the Court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said Declaration • • • said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 percentum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the Court."

It will be seen that the pre-existing common-law rule was incorporated into the Act, and the only effect of the legislation is to require the use of a uniform rate of interest in compensating a landowner for the loss of use of his property or its money equivalent. This statute was expressly employed in the instant case by the filing of the Declaration of Taking (R. p. 10).

II.

The Rule That Interest Cannot Be Collected From a Sovereign in the Absence of a Contract or Statute Authorizing It Is Not Applied in Proceedings Brought by the Sovereign to Condemn Property for Public Purposes.

It is well settled that generally interest cannot be collected from a sovereign in the absence of a statute or a

stipulation in the contract authorizing the same. **United States v. State of North Carolina**, 136 U. S. 211, 10 S. Ct. 920. But this rule is not applied in condemnation cases where the constitutional guarantees of "just compensation" afforded the landowner require the payment of interest, or its equivalent, even though no statute or contract authorizes the awarding of interest. **Seaboard Airline Ry. Co. v. United States**, 261 U. S. 299, 43 S. Ct. 354; **United States v. Sargent**, 162 Fed. 81, 89 C. C. A. 81; **Van Wagoner, Highway Commissioner, v. Morrison**, 279 Mich. 285, 271 N. W. 760; **State ex rel. Steubenville Ice Company v. Merrell, Director of Highways**, 127 Ohio St. 453, 189 N. E. 116.

In **Seaboard Airline Ry. Co. v. United States**, supra, a condemnation proceeding was brought under a statute which did not provide for an allowance of interest, the Court saying:

> "The rule above referred to that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirements that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

III.

The Contract Served the Purpose of a Commissioners' Award or Jury Verdict in Condemnation Proceedings by Fixing the Value of the Property at the Time of the Taking.

The legal effect of the contract to purchase the land in question upon this condemnation suit brought by the Government after it had repudiated the contract is left in considerable doubt by the opinion of the Court of Ap-

peals. In its opinion the Court of Appeals seemed to proceed upon the premise that because this Court upheld the contract in Muschany v. United States, 324 U. S. 49, 65 S. Ct. 442, the condemnation proceeding was thereby converted from a condemnation proceeding to a suit for specific performance of the contract. Of course such a premise is unjustified. This is in no sense a suit against the Government for the specific performance of a contract. The District Court would have had no jurisdiction of such a suit under 28 U. S. C. A., Sec. 41 (20), where the Tucker Act limits the jurisdiction of federal district courts in suits on contracts against the Government to controversies involving not more than $10,000. This is a condemnation suit in which the Government obtained title solely by virtue of its Declaration of Taking filed pursuant to 40 U. S. C. A., Sec. 258a. Having obtained title in condemnation only by virtue of that statute, the effect of the contract is to engraft upon the rights and duties of the parties under that statute the provisions of the contract only so far as the contract sets the fair value of the land. The contract, therefore, supplies the function of a commissioners' award or a jury verdict in the condemnation proceedings in fixing the value of the property at the time of the taking. Other than eliminating the necessity for this procedural step, the contract in no way changed the fundamental nature of this condemnation proceeding.

Much light is shed upon the legal effect that is to be given to such an agreement by the opinion of the Supreme Court in the case of **Danforth v. United States**, 308 U. S. 271, 60 S. Ct. 231. There the Government and the landowners made a contract for the purchase by the Government of a flowage easement over the land for the sum of $31,681.98. The contract provided that friendly condemnation proceedings would be instituted by the Government. Thereafter the Government repudiated the contract

and brought condemnation proceedings under the Flood Control Act. The landowners asserted their contract in their answer, which was stricken by the trial court on motion. The commissioners awarded the landowners only $17,921.70. On appeal this Court said (308 U. S., l. c. 281):

> "We construe the accepted offer as an agreement to fix the price at the named figure for the easement sought. * * * The effect of such an agreement is to fix the value of the easement when the authority of the Court is invoked against a party to the agreement to acquire good title."

The landowners were awarded the amount agreed upon in the contract. From the language just quoted it will be seen that the court held that the contract supplied the function of a commissioners' award or jury verdict in condemnation proceedings in fixing the value of the property at the time of the taking.

The Government pursued precisely the same course in the present case that it did in the **Danforth** case. The parties fixed a price on the property by their agreement in advance of the litigation. It is true that in the contract in the instant case it was not agreed that condemnation proceedings would certainly be instituted, but only on condition that the Attorney General refused to approve the title. But this difference is of no consequence because in both the **Danforth** case and the instant case the condemnation proceedings were instituted after the Government had repudiated the contract and were not brought pursuant to the contract. If the same effect is to be given to the contract in this case as was given to the contract in the **Danforth** case, it must be considered "an agreement * * * to fixe the value" of the land in question in lieu of a commissioners' award or a jury verdict. Upon the authority of the **Danforth** case, when the Government at-

tempted to repudiate its contract by bringing this condemnation proceeding, the parties' obvious intention to fix the value of the land by the contract should, as a matter of law, be given effect under existing circumstances by substituting the contract price for the award or verdict.

In the companion case of **Muschany v. United States**, 324 U. S. 49, 65 S. Ct. 442 this Court, referring to a contract identical in form to the one in the case at hand, said (65 S. Ct., l. c. 445):

> "The option * * * provides for an agreed valuation at the option price in case of condemnation."

The fixing of the fair market value of the property by the contract instead of by a commissioners' award or a jury verdict did not in anywise change the nature of the condemnation proceeding brought by the Government. As was said in **United States v. Baugh** (149 Fed. [2], l. c. 192):

> "The stipulation merely had the effect of relieving the Government from having to make proof as to what was just compensation and of running the risk of having an amount fixed which might be unsatisfactory. The stipulations eliminated controversies, but otherwise the condemnation suit proceeded to final judgment."

Since the land in the case at hand was taken over four years before payment was made, if the landowners had elected to recognize the breach of the contract by the Government and had permitted commissioners or a jury to fix the fair market value of the property, beyond any question they would have been entitled to interest for the time during which payment was postponed in addition to the fair market value of the property. Having elected, however, to uphold the contract and to have the fair market value fixed in accordance with its terms, the only effect upon the proceeding is to eliminate the neces-

sity of a commissioners' award or a jury verdict to fix the value of the property, and the landowners are entitled to interest for the postponed payment in the same manner in which they would have been entitled to interest had the value of the property been fixed by award or verdict. A reading of the entire record of the case shows that the action was instituted as a condemnation proceeding pursuant to the Federal Statutes in such cases made and provided, including the Declaration of Taking statute (40 U. S. C. A., Sec. 258a), which expressly requires the payment of interest for delayed payment. And the proceeding continued to its end in compliance with condemnation practice with the single exception of the agreement between the parties being substituted for the commissioners' award or jury verdict.

The landowners, by their successful defense of the validity of the purchase contract in **Muschany v. United States**, supra, did not change the nature of these condemnation proceedings instituted by the Government. This is still a condemnation proceeding in which the Government obtained title by virtue of these proceedings and the only effect of the contract as held by this Court in **Muschany v. United States** is to eliminate the necessity for one of the procedural steps in the condemnation proceeding.

IV.

The Landowners Did Not Waive Their Right to Interest Guaranteed Them Under the Constitution and by Statute in the Contract in the Instant Case.

Under the foregoing principles at the time the Government filed this condemnation proceeding and acquired title to the property by virtue of its Declaration of Taking, the landowners were entitled under the Constitution and 40 U. S. C. A., Sec. 258a, to "just compensation", which included the fair market value of the property at

the time of the taking and interest at six per cent (6%) upon the value of the property from the date of taking to the date of payment. This right to "just compensation" including interest is still existent unless the landowners waived their right to interest in the contract.

Without making a detailed analysis here of the provisions of the contract, it may be said categorically that there is nothing therein which either expressly or impliedly waives the landowners' right to interest. The subject of interest is not mentioned at all. It may be implied, however, as a matter of law that the parties intended that interest should be paid in the event of involuntary condemnation because it was the settled law of the land under the Constitution and by statute that interest must be paid as compensation for loss of use of the land. The law subsisting at the time and place of making a contract is a part thereof, as though expressly referred to or incorporated therein. **Farmers & Merchants Bank of Monroe v. Federal Reserve Bank of Richmond,** 262 U. S. 649, 43 S. Ct. 651. Thus, though the parties did not expressly cover the question of interest in the contract because the landowners did not anticipate the bringing of this condemnation proceeding constituting repudiation of the contract, in the absence of an express provision as to interest it may be taken as a matter of law that the parties intended that in the event the Government repudiated the contract and condemned the land interest should be paid. Of course, what the parties to the contract did intend to do was to fix the value of the property in question at the amount agreed upon, and the question here is whether such a contract constitutes a waiver of a constitutional and statutory right.

The Court of Appeals in its opinion held in construing the contract that it was the intent of the parties thereto that the $70,000 agreed upon should include all items of "just compensation" and not merely the agreed value of

the land at the time of the taking. Such a construction of the contract is premised upon the theory that the landowners in the contract waived their constitutional and statutory right to interest. A reading of the contract reveals that no such waiver is contained therein. In fact, interest is not mentioned anywhere within its four corners (R. pp. 36-38). The $70,000 is referred to variously as "the gross sales price" (R. p. 36), "the agreed purchase price" (R. p. 37) and "the agreed valuation" (R. p. 37). If anything, these terms are more closely related in meaning to the fair market value at the time of taking than they are to interest. Certainly that is so of the phrase "the agreed valuation." It should be noted that the contract expressly provided that if the title to the land was not approved by the Attorney General, the Government should acquire the land by condemnation proceedings and in such proceedings "a consent verdict fixing the award at the agreed valuation" should be entered (R. p. 37). If such had occurred and if the Government had delayed payment of the award, no one would deny the right of the landowners to interest for the delay in payment. This indicates that the amount agreed upon in the contract served the same purpose as an award, which is always the fair market value of the property at the time of the taking, and does not include interest for delay in payment of the award.

The Court of Appeals' conclusion that the amount fixed in the contract included interest as well as the fair market value at the time of the taking seems to be based in the main, if not entirely, upon the fact that by the contract the Government was granted the right of immediate possession as well as title to the land, and upon the construction by the Court of Appeals that the contract did not fix a time within which payment was required. From this the Court apparently believed that it was the right of the

Government under the contract to acquire possession and retain it indefinitely without paying for the use of the property, which, incidentally, is almost what the Government did. No such construction of the contract is justified either in the letter or the spirit of the instrument. It is true that the contract did give the Government immediate possession, but by its very terms the Government could remain in possession only "* * * until such time as said land is conveyed to the Government * * *, the title approved * * * and the agreed purchase price paid by the Government * * *" (R. p. 37). A subsequent provision in the contract required the Government to make payment as follows (R. p. 37):

> "Upon furnishing of final certificate of title * * * the agreed purchase price above mentioned will be paid by the Government to the undersigned."

From this it will be seen that although the Government obtained the right of immediate possession under the contract, it could only remain in possession until it paid the agreed purchase price and this it was required to do when a final certificate of title was furnished it by the landowners, and it could not remain in possession of the land indefinitely under the contract.

It is submitted that the proper construction to be laid upon the contract is that which the Fifth Circuit Court of Appeals in **United States v. Baugh**, 149 Fed. (2d) 190, gave to a similar contract. There condemnation proceedings were instituted by the United States of America against certain land which it desired to acquire for military purposes. After the petition had been filed the Government and the landowners entered into a stipulation agreeing that the court "* * * is hereby authorized and petitioned to enter without further notice a final judgment and decree in said action in accordance with the prayer in plaintiff's petition herein, or any declaration of taking

which may hereafter be filed by the plaintiff, vesting the title to the above described property in the United States of America, and adjudging just compensation for the lands taken, to be in the sum of * * *." About seven months elapsed between the execution of this stipulation and the payment of the amount due thereunder. In holding that the landowners were entitled to interest in addition to the amount agreed upon in the stipulation for the period of time between the signing of the same and the payment of the amount agreed upon, the court said (149 Fed. [2d], l. c. 193):

> "* * * when the parties reduce to writing a stipulation fixing just compensation there seems to be no reason to conclude that the landowner **impliedly** waived any legal right.
>
> "* * * But the Government failed to pay for seven or eight months thereafter, and there is neither proof nor presumption that the landowners intended to waive interest in the future, particularly for such an indefinite and unreasonable period, and such a waiver cannot be read into the agreement. Their right to have interest is found in the Constitution and is neither found nor lost in the contract." (Emphasis of the court.)

Since more than four years elapsed between the signing of the contract in the case at hand and the payment of the amount thereunder, it is interesting to observe that the Court of Appeals in **United States v. Baugh** found that a delay in payment of seven or eight months was an unreasonable period.

Any fair construction of the contract will reach the conclusion that the parties intended only to fix the value of the land. The legal effect of such an agreement in the event of repudiation and condemnation, as is pointed out in III supra, is that the contract serves in lieu of commissioners' award or a jury verdict fixing the value of the

property at the time of taking. In no way can it be said that the landowners, by agreeing upon the valuation of the land in a sales contract, thereby intended to waive their constitutional and statutory rights to interests in condemnation. If the solution to the problem is to be found in the opinions of this Court set out in I, II and III, supra, then the conclusion is forced that a reading of the contract in this case shows no evidence that the landowners intended to waive their right to interest guaranteed them in the event of condemnation by constitutional and statutory principles entirely independent of the contract.

In its brief in opposition to the Petition for Certiorari, the Government took the position that the landowners were not entitled to "just compensation" because the landowners insisted upon the contract as setting the market value of the land at the time of taking. This argument means that anyone who contracts to sell property to the Government ipso facto loses the constitutional and statutory guarantees he otherwise would have in the event of repudiation of the contract by the Government and subsequent condemnation. The argument is not based on the doctrine of intent or waiver but instead upon the flat premise that one who contracts with the Government thereby places himself beyond the pale of the protection of the Constitution and statutes in the event the Government thereafter decides to repudiate the contract and acquire the property by condemnation. This argument obviously goes much further even than the opinion of the Court of Appeals. The argument also means that this Court was wrong in **Muschany v. United States**, supra, and in **Danforth v. United States**, supra, in holding that the effect of such a contract is only to fix the value of the property at the time of taking in the event of condemnation. Under the holding of this Court in the two cases

last mentioned, the landowners, by signing the Government's contract, did not thereby deprive themselves of their constitutional and statutory rights, and the only way they could so deprive themselves would be to expressly waive those rights. It is submitted that such a waiver is not present in this contract.

V.

A Condemnation Statute Under Which Proceedings Are Instituted Will Be Construed Strictly in Favor of the Landowner and the Statute Must Be Fully Complied With.

There is a general principle governing the conduct of condemnation suits which is squarely applicable. It is well settled by numerous authorities that because the right of the condemnor to take a person's property without his consent is sharply at variance with the property rights of the owner, a condemnation statute under which proceedings are brought will be strictly construed in favor of the landowner and the statute must be fully complied with as a condition to the exercise of this unusual and arbitrary power on the part of the condemnor. **City of Cincinnati v. Vester**, 281 U. S. 439, 50 S. Ct. 360; **U. S. v. 2.4 Acres of Land in Lake County**, 138 Fed. (2d) 295; **City of St. Louis v. Smith**, 325 Mo. 471, 30 S. W. (2d) 729, and **State ex rel. Siegel v. Grimm**, 314 Mo. 242, 284 S. W. 490.

In the case at hand, although the condemnor expressly invoked 40 U. S. C. A., Sec. 258a, in its Declaration of Taking filed in this case (R. pp. 10-14) for the purpose of acquiring title to the land at once, the Government refuses to comply with the express requirements of the statute with reference to the payment of interest. This constitutes a failure to comply with the condemnation statute under which the proceedings were conducted in direct violation

of the rule that such statutes must be strictly complied with, especially where a violation would be in derogation of the rights of the landowner.

VI.

By Taking Title to the Property Under 40 U. S. C. A., Sec. 258a, the Government Is Estopped to Deny Its Obligation to Pay Interest as Required by the Statute.

40 U. S. C. A., Sec. 258a, confers valuable benefits upon the United States Government in a condemnation suit, chief of which is the opportunity to obtain title to the land at once pending the litigation. On the other hand, the statute imposes the obligation to pay interest upon the value of the property where the property is taken before payment is made. The Government availed itself of the special privileges of the statute by filing a Declaration of Taking, and obtaining title to the lands in question at once. It is fundamental that a party will not be permitted to enjoy the benefits of a transaction and repudiate the obligations arising therefrom, especially where the other party to the transaction has been placed at a disadvantage, as the landowners were in the case at hand by being deprived of the title to their property. **Davis v. Wakelee**, 156 U. S. 680, 15 S. Ct. 555; **Officer v. J. L. Owens Co.**, 252 Fed. 337.

In **Chicago Great Western Ry. Co. v. Kemper**, 256 Mo. 279, 166 S. W. 291, the court adopted the following language found in the case of **Holland v. Spell**, 144 Ind. 561, 42 N. E., l. c. 1015:

> "That he may estop himself, by the receipt of the money awarded in condemnation proceedings, to deny the validity of the proceedings, was held in a full and satisfactory opinion and citation of authority in Test v. Larsh, supra. **We can conceive no good reason why he should, in good conscience, be permitted to receive**

> **all the benefits of the proceedings, and, while holding them, deny that the proceeding is effectual to create the burdens corresponding to such benefits."** (Emphasis ours.)

In **Horne v. Beattie**, 167 La. 647, 120 So. 38, l. c. 39, the court said that "a person cannot accept the benefits of an act and repudiate its obligations."

In **Mauritz v. Schwind**, 101 S. W. (2d) 1085, l. c. 1092 (Tex. C. A.), the court said:

> "A person will not be permitted to accept the beneficial part of a transaction and repudiate the disadvantageous part."

In **Southern Surety Co. v. Illinois Powder Mfg. Co.**, 31 S. W. (2d) 314 (Tex. C. A.), the court held that where a party invokes a statute as the basis of his claim, he must take the statute as a whole.

On the basis of these authorities the Government, having enjoyed the benefits of the Declaration of Taking filed pursuant to 40 U. S. C. A., Sec. 258a, should be estopped from denying the obligations arising from the statute.

The Government has suggested in its brief in opposition to the Petition for Certiorari that the statute is not applicable because the full condemnation procedure was not followed. The force of this argument is not clear. The Government holds title to the land formerly owned by these landowners solely by virtue of this condemnation proceeding and the Declaration of Taking filed by the Government under this statute. The fact that this Court has held in **Muschany v. United States**, supra, that the contract makes unnecessary some of the procedure in condemnation because the parties, by the contract, fixed the value of the land does not change the fundamental fact that the Government obtained title by virtue of this statute, and, therefore, is now estopped from denying its obligations under the statute.

CONCLUSION.

It is respectfully urged that the judgment and record of the Court of Appeals of the Eighth Circuit in this case be quashed by this Court and that this Court determine that the landowners in the instant case are entitled to interest at the rate of six per cent (6%) per annum on $70,000 from the date of the taking of their property to the date of the initial payment of $21,500 (June 6, 1941), and interest at the same rate on the deficiency of $48,500 from June 6, 1941, to the date of the payment into Court of said deficiency. (May 17, 1945), and that the cause should be reversed and remanded to the trial court for a hearing to fix the date of taking and to compute the interest in this manner.

Respectfully submitted,

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APPENDIX.

Title 40, U. S. C. A., § 258a:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto:

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right

to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, § 1, 46 Stat. 1421.